# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

SANTIAGO AINSA, ADMINISTRATOR, appellant, v. THE UNITED STATES. } No. 27.

*APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.*

**ABSTRACT, STATEMENT, AND BRIEF ON BEHALF OF THE GOVERNMENT.**

## ABSTRACT AND STATEMENT.

This suit was instituted by the United States under the provisions of section 8 of the act of March 3, 1891, being an act to establish the Court of Private Land Claims and to provide for the settlement of private land claims in certain states and territories. (U. S. Stat. L., vol. 26, p. ~~585.~~ 854)

The issues were made up by the defendant, Santiago Ainsa, as the administrator of the estate of Frank Ely,

deceased, filing an amended answer, by which he claims to own in fee, hold and possess the land known as the SAN JOSÉ DE SONOITA grant, situate in that portion of Arizona acquired from the republic of Mexico under the treaty of Mesilla (Gadsden purchase) of December 30, 1853, under and by virtue of an alleged grant title bearing date May 15, 1825, made and executed by one Juan Miguel Riesgo, commissary-general of the treasury, public credit and war of the state of the occident, in the name of the sovereign nation of the Mexican republic, under and by virtue of article 81 of the royal ordinance of intendants of December 4, 1786, and pursuant to the provisions of the royal decree of October 15, 1754; that under the provisions of the law the said commissary-general of the state of the occident, in the name of the sovereign nation of the republic of Mexico, duly and regularly, and for a good and valuable consideration, to wit, the sum of one hundred and sixteen dollars, two reales and five grains, and for other good and valuable considerations in said grant title set forth, did, on May 15, 1825, sell and convey in fee to one Don Leon Herreros the said land known and called the San José de Sonoita grant or private land claim; that said proceedings were instituted by said Herreros by petition to Brigadier-General Cordero, governor and intendant of the province of Sinaloa and Sonora, praying for TWO *sitios* of land, more or less, in a place known as Sonoita in the jurisdiction of the *presidio* of Tubac, and that proceedings of survey, valuation, and publication were taken on said petition, and on May 15, 1825, the tract,

as surveyed according to said title papers, and the whole of said tract, according to the natural landmarks and boundaries as set out in said proceedings of survey, was sold to said Herreros for the sum of one hundred and sixteen dollars, two reales and five grains, which amount was thereupon paid by said grantee; and that on said May 15, 1825, there was issued to the grantee a *testimonio*, or *titulo*, of said grant, and that the said grant was thereupon on said last-named date duly recorded in the archives of Mexico, to wit, on page 2 of the proper book in the office of the commissary-general.

It is averred that the map filed with the petition, executed by George D. Roskruge, esq., is a correct map of said San José de Sonoita grant, and correctly represents the boundaries of said grant and lands embraced therein, comprising 12,147.69 acres, and that the defendant is the owner in fee of the whole thereof.

It is also averred that proceedings were taken under the provisions of the act of congress of July 22, 1854, before the surveyor-general of Arizona, for a confirmation of the grant, and the same was recommended for confirmation by said surveyor-general only to the extent of one and three-fourths *sitios*, as measured by the original grant, and no more. It is averred that Ainsa, the defendant, holds by divers mesne conveyances from the original grantee.

It is also averred that the other persons claiming to own the property under the public land laws of the United States, as mentioned in the original petition by the United States, are unlawfully upon the same and

without warrant or authority from the defendant, Ainsa, the claimant under the original grant; that by virtue of his original grant and mesne conveyances, and his possession of the property, the defendant is entitled to have the whole of said tract, as surveyed by said Roskruge, confirmed under the provisions of the act creating the Court of Private Land Claims. (R., 6–9.)

To this amended answer the government filed a general reply putting in issue the various allegations of it. (R., 9, 10.)

A translation of a certified copy of the *expediente*, on file in the office of the treasurer-general of the state of Sonora (R., 89–108), was offered in evidence by the claimants. The original *testimonio* or *titulo*, in Spanish (R., 109–116) and translation thereof (R., 116–123), was introduced by the claimants.

The first portion of this *titulo* was executed in 1825 (R., 116) and forms no part of the original proceedings. The petition was directed to the intendant governor by Leon Herreros, resident of the military post of Tubac, and states that to the east of said post about eight leagues is situated a place known as Sonoita, which had anciently been an Indian town, but it was abandoned by reason of the incursions of the Apache Indians; and desiring to provide a place to herd some of his cattle, and having no land upon which to do so, he registered in the aforesaid place TWO *sitios* of land, which he promised to stock with cattle and horses, and offered to pay the just price at which it might be valued. This petition was signed by José Ma. Sotello, for Leon Herreros (R., 117). It will

be noted that the petition specifies the exact amount of land registered, which was TWO *sitios*.

At Arizpe, on May 29, 1821, Cordero, the governor intendant, allowed the petition, without prejudice to third parties having a better right, and directed the commander of the company at Tubac to proceed to the survey of the lands registered by the petitioner, summoning the adjoining owners, and directed him to appoint experts to appraise the land at its just value, which he should publish for thirty consecutive days, asking for bidders, and execute all the proceedings required by law until the *expediente* should be completed to a condition to be remitted to him, in order that further proceedings might be taken in the special tribunal, so as to issue corresponding grant or title (R., 117, 118); and at Tubac, on the 22d of June, 1821, Ygnacio Elias Gonzales, purporting to be the commander of the company stationed at Tubac, accepted the appointment. (R., 118.) It will be noted that this appointment is signed by Ygnacio Elias Gonzales and attested by José Ma. Sotello, the attorney petitioning for Herreros, and Pedro Ramierez.

Thereupon Gonzales proceeded to nominate the officials, to-wit, the citizens Manuel de Leon, José Ma. Sotelo, and Don José Monreal, who purported to have qualified under oath to faithfully perform their mission; and after taking a general view of the place and the limits of the adjacent proprietors, they executed the survey, as appears from the following report (R., 118, 119):

> In the abandoned place of San José de Sonoita, on the twenty-sixth day of June, 1821, I, the said

lieutenant-commander and subdelegate of the military post and company of Tubac and its jurisdiction, in order to make the survey of the land denounced by Leon Herreros of this vicinity, delivered to the appointed officials a well twisted and stretched cord, and in my presence was delivered to them a Castilian *vara*, on which cord was measured and counted fifty regulation *varas*, and this being done, at each end were tied poles, and standing on the spot assigned by the claimant as the centre, which was in the very walls of the already mentioned Sonoita, there were measured in a northeasterly direction sixty-three cords, which ended at the foot of some low hills, a little ahead of a spring—a chain of mountains of a valley, which goes on and turns to the east, where was placed a heap of stones as a monument; * * * from the place where the monument was placed there was measured to the southeast twenty-five cords, which going up a valley ended on the left side of a chain of hills, and at the foot of one of them, whose slope was covered with oak trees, and in the top was placed a heap of stones as a monument; and on the opposite side there was estimated also twenty-five cords, ending on a high white hill covered with grass, distinguished by this reason from the others near it, which are a part of the Santa Rita mountains, and on the top I ordered a heap of stones to be placed as a monument. In this way the measurement was finished at this end of the survey, with its proper corners and heads. Turning to the center, the cord was measured in the direction of the east, and there were measured and counted twenty-five cords, ending before reaching a high mountain located on this side, on a somewhat high hill, covered with many oak trees, where I ordered to be put a heap of stones in sign of a

monument. Returning to the center, the cord was laid toward the west and twenty-five cords were measured, ending on the main road to Tubac, on a little hill called the "*casadero*," on which was placed a heap of stones as a monument. * * * Taking as a starting point the place designated as the center, the cord was extended toward the south all along down the *cañon*, by which there were measured and counted three hundred and twelve cords, that ended in the same *cañon* upon going down a hill, on the main road, at a place called the First ford, with the direction looking toward the west, on account of the turn which the said *cañon* had made, and there was put a heap of stones as a monument, and as heads of corners there were estimated on the side twenty-five cords, to the other side of a ledge that ends in high, rolling bowlders in which a hill that forms a little valley, where I ordered to be placed a heap of stones as a monument. And on the left side there were estimated by the surveyors twenty-five cords to the first of two hills almost exactly alike, one to the other, which are named the Twins, which serves as a monument, as these are distinguished from all the other hills which surround them, and on the summit I ordered to be placed a cross. This end of the survey is about two leagues, more or less, off from the Calabasas ranch, at the nearest place, and the other end only adjoins with places frequented by the enemies as they come to rob and invade the country. And in view of the suggestion made by the claimant to reduce the number of cords actually measured so much as might be calculated to be in fact in excess of the true measurement by reason of the many turns of the *cañon* over which the survey was made, as it could not be carried on straight. I appointed

> for that purpose Lieut. Don Manuel Leon and the citizen Don José Ma. Sotelo, who were unanimously of the opinion to deduct twenty-five cords out of the three hundred and twelve cords measured in the last survey down the *cañon*, the claimant consenting thereto as just; the survey was calculated to be two hundred and eighty cords, with which this survey was finished, resulting from it one *sitio* and three-fourths of another *sitio*, registered by Don Leon Herreros for raising stock and for farming purposes. (R., 118–120.)

These proceedings of survey occupied two days, and a report is made for each day, both of which are signed by Ygnacio Elias Gonzales, Manuel de Leon, and José Ma. Sotelo. It is to be noted that Sotelo is the attorney for the petitioner. The assistants or witnesses attesting these reports were Ygnacio and Tomas Ortiz, who were the grantees in the Canoa grant (*U. S.* v. *Maish et al.*, No. 297), which is for argument with this case.

Then follows the appraisement, by which the calculated amount of land, one and three-fourths *sitios*, was valued at one hundred and five dollars, and at which value a publication of thirty days, soliciting bidders, was made, and no one appearing, the claimant presented himself with the *expediente*, which by the decree of October 21 was sent to the *promotor-fiscal* for report. (R., 120.)

On November 7, 1821, Francisco Perez, the *promotor-fiscal*, made his report, stating that he had carefully examined the land surveyed in favor of Herreros in the place called Sonoita, from which resulted one and three-fourths *sitios*, for raising stock and horses, valued at sixty dollars each *sitio*, which sums up one hundred and five

dollars; that it had running water, and some pieces of land for cultivation, and that the same having been published for thirty consecutive days and no bidders offering more than the appraised value, the commissioners inquired and found the claimants had the means to settle and occupy the land, wherefore he advised that the three publications at the capital, seeking for bidders at auction, should be made, and that the same should be sold to the highest bidder with the understanding that he would have to pay into the national treasury the whole value of the land, eighteen per cent for forwarding, two per cent for the general fund, and three dollars for the officials of the extinguished treasury department, and that he should be given a receipt for the total sum, which must be attached to the *expediente* and the same should be sent to the superior board of the public treasury in order that it might be determined what should be done in the premises. (R., 121.)

Then follows an indorsement by Bustamante, the intendant, attested by José Ma. Mendoza and Joaquin Elias Gonzales, wherein he states (R., 121):

> And this commissary-general being satisfied with the foregoing petition, the three publications were made, which took place on the 8th, 9th, and 10th days of November, 1821, the one *sitio* and three-fourths of another being solemnly auctioned off in favor of the denouncer, Don Leon Herreros. Immediately notice of the transfer being added to the original *expediente* it was given to his agent, who answered in writing that he was satisfied with the proceedings, that he should be allowed a settlement with the

treasury, and that the corresponding title and confirmation should be issued to his principal. In virtue whereof the following order was issued:

* * * * *

The Spanish text of the foregoing is as follows (R., 114):

*Y habiendose conformado esta comisaria general, con el preinserto pedimento, se procedió á la celebracion de las tres publicas Almonedas, que se practicaron en los dias 8, 9, y 10 de Nobiembre de 1821, quedando solemnemente rematados el expresado sitio y tres cuartos de otro á fabor de su denunciante D. Leon Herreros. En acto continuo se le corrió traslado con el expediente original á su apoderado, contesto pr. escrito estar conforme con todo lo actuado, que se le admitiese á composicion con la hacienda, y q. se le librase á su parte el correspondiente titulo de mercid y conformacion. En tal virtud se proveyó el auto en vista q. á la letra sigue.*

Then follows the order of Bustamante, issued from the city of Arizpe on November 12, 1821 (R., 121), stating that he had examined the documents of survey, appraisement, and publication, auction and sale of the lands at the place called San José de Sonoita, containing one and three-fourths *sitios* for the raising of cattle, in favor of Herreros, and the report of the *promotor-fiscal*, and declaring the proceedings to be in good order and form, and that he allowed settlement to be made with the national treasury for the said lands of said Herreros, and he ordered that notice be given to the agent of Herreros, to deliver to the treasury in that city in the following manner the sum of one hundred and sixteen dollars, two reales and five

grains; one hundred and five dollars as value of said land; six dollars, one reale, seven grains, as land fee, and its eighteen per cent; two dollars ten grains for the two per cent for the general fund, and three dollars as fees of the extinguished account of the same treasury; and upon the certificate thereof being inserted in this *expediente*, the same should be reported to the superior board of the treasury for its approval or to make such disposition of it as to them might appear best. (R., 121–122.)

This closes the *testimonio* with the exception of the extending of the original grant by Juan Miguel Riesgo on May 15, 1825, four years and a half after the closing of the *expediente*.

Referring now to the proceedings as shown by the *expediente* subsequent to the report of the *promotor-fiscal*, Francisco Perez, we find that on November 7, 1821, Bustamante ordered that the three *almonedas* or offers of sale should be made (R., 104), and that Serrano, the attorney for Herreros, should be notified; then follows the appearance of the attorney (R., 104) and the three *almonedas* in due form on November 8, 9, and 10 (R., 104–105).

On November 10, 1821, the following order appears (R., 105):

ARIZPE, *November 10, 1821.*

> Let this *expediente* pass over, with the authorized copy, containing the superior proceedings according to the regulation on the subject, to the attorney, Don José Ma. Serrano, so that within three days he may take such steps as he may think proper on the subject, notifying him to appoint in Mexico an attorney duly authorized and paid to expedite the case at that

court. The intendant *ad interim* so decreed it and signed it with assistant witnesses according to law, in default of a secretary, there being none.

BUSTAMANTE.

Asst: JOSÉ MA. MENDOZA.
JOAQUIN ELIAS GONZALES.

NOTE.—On the same day this *expediente* was delivered in seventeen folios, according to this decree.

Following this is the acknowledgment by Serrano, attorney for Herreros, of the foregoing order, expressing his desire to comply with the same and hasten the *expediente* to a perfect conclusion. (R., 105, 106.)

All of the foregoing proceedings taken in the *expediente* were attempted to be summarized by the preamble to the order of Bustamante, dated on the 12th of November, 1821, before cited. (R., 121.) This order is found in the *expediente* (R., 106), and in the *testimonio* (R., 121–122).

In the *expediente* the following proceedings appear: Notice and acceptance of notice to the attorney Serrano of the order of November 12, 1821, fixing the total amount due (R., 107); following this is the action of the provincial board of the national treasury at Arizpe, finding that the sale of one and three-quarters *sitios* of land at one hundred and five dollars was legally made, and directing that report be made to the superior board of the treasury of this *expediente* for its approbation or for such disposition as it might think proper (R., 107). On the same day is the order of Bustamante directing that the order of the board should be executed, and on

the same day is an entry in the account books of the provincial office of the national treasury at Arizpe, on folio 37, that there was charged one hundred and sixteen dollars, two reales and five grains, which had been paid by Serrano in the name of Herreros in the following manner: One hundred and five dollars as principal value for one and three-quarters *sitios* of land for raising cattle contained in the place of San José de Sonoita; six dollars, one real and seven grains, one-half annual charge, and eighteen per cent for transfer to Spain; two dollars and ten grains for the two per cent as a general charge, and three dollars for the extinguished account as explained in the order of the *intendencia* marked No. 32; total one hundred and sixteen dollars, two reales and five grains. (R., 107.)

Following this is a certificate as follows (R., 108):

> And that it may be admitted, wherever it may be presented, we issue the present.
>
> Arizpe, November 12, 1821.
>
> MIGUEL MA. DE LA FUENTE.
>
> TOMAS DE ESCALANTE.

This is the *expediente*, as originally made up and concluded on November 12, 1821, and no further proceedings appear to have been taken on the same until May 15, 1825, when the following appears (R., 108):

> NOTE.—On May 15, 1825, title was issued on this *expediente*.
>
> [RUBRICA.]

All of these proceedings taken in the *expediente* after the order of Bustamante (R., 106), down to and including the certificate of Fuente and Escalante (R., 108),

are attempted to be summarized in the *titulo* or *testimonio* in the following manner (R., 122):

> The agent being notified of this order, he proceeded to make the payment ordained, as appears by the certificate adjoined to the *expediente*, in which state it remains in the keeping of the general office (*comisario general*) as a perpetual record.

The Spanish text of which is as follows (R., 115):

> *Notificada q. fué esta providencia al apoderado procedió este á hacer el entero que se le previene, como lo acredita la certificacion qe. se agregó al Expediente respectivo, en cuyo conformidad queda custodiado en esta Comisario general pa. la perpetua constancia.*

The formal title, which appears to have been issued by Riesgo on May 15, 1825, is pursuant to the alleged authority of article 81 of the royal ordinance of intendants under the provisions of the royal *cedula* of October 15, 1754, and based upon these two decrees he seeks to grant and confirm the title of the property, in the name of the sovereign nation of the republic of Mexico, to Herreros to one and three-quarters *sitios* of land which had been surveyed in his favor upon the condition that he occupied and cultivated the land to the utmost of his ability, without allowing it to be totally abandoned for one entire year, and should there be any other person asking to settle upon it in such event, previous notice being given, it should be sold to the highest bidder, and that Herreros should confine himself to his own limits and boundaries prescribed in the proceedings of survey, which should be marked by monuments of stone and mortar, in which terms he ordered the present title, and

directing that, previous note of it having been taken in the corresponding book, the original should be delivered to the claimant for his protection and use as legitimate proprietor, owner in fee, and only possessor of the land. (R., 122–123.)

[The use of the phrase "owner in fee" is inaccurate. It should be "absolute owner" (*dueño absoluto*). I make this correction for the reason that no such estate as a "fee-simple," known to the common law, existed in Spain or Mexico, the element of perpetual succession being absent.

Special attention of the court is called to the form and make-up of the *testimonio* or *titulo* in the Canoa case. (See Canoa, R., 30–52.) This *testimonio* exactly conforms to the *expediente* in the Sonoita case, and is a copy of the *expediente* in the Canoa case on file in the archives at Hermosillo, differing materially in form and recitals from the *testimonio* in the Sonoita case. It is true that the alleged final title in the Sonoita case and the preamble attached to the *expediente* were not executed until May 15, 1825, whereas in the Canoa case they were executed on the 2d of February, 1849. The *expedientes* in both of these cases were made up by the same officers and within a few days of each other, and the authority for making them was based upon the order of governor and intendant Cordero on May 29, 1821.]

R. C. HOPKINS testified, on behalf of the defendant, that he was seventy-eight years of age, and from 1855 till 1886 was in the service of the United States in connection with Spanish land grants in California and Arizona. In 1879 he was sent as special agent to

Mexico for the purpose of examining the records in relation to private land claims, and spent several months in such examination. Witness identified the title papers in the Sonoita grant; said that he believed the signatures of Juan Miguel Riesgo and José Maria Mendoza to be genuine; is familiar with the Spanish language. During his examination of the archives he examined the *expediente* or matrix of this grant, and thinks it was written upon stamped paper. On cross-examination he does not recollect whether this grant was noted in the book of *toma de razon*, but does not think the *toma de razon* went back of the year 1825; states that the *testimonio* or *titulo* should be a copy of the matrix or *expediente*, but could not say whether such was the case in this instance or not, though he thinks the *expediente* is complete in this case; does not think that there was any note made in the book of *toma de razon* of this grant, nor does he recollect of seeing a *borrador* of the same in the archives; does not recollect whether there was in the archives any copy of the proceedings taken in 1825 in this case; the *expediente* should contain each step down to the issuance of the grant; there is no copy of the grant attached to that. Witness states that a copy or *borrador* of the grant should be attached to the *expediente* in the archives, and such is generally the case, and the original of the same attached to the *testimonio*, although such is not always the case either in Hermosillo or in California; that the *expedientes* in San Francisco are made up in the same way and the *borrador* is generally attached to the proceedings, and the *testimonio* ought to

be a copy of the *expediente* or matrix; there should be attached to the *expediente* a copy of the original patent or grant in order to make it regular.

On redirect examination witness defines a *borrador* as an unsigned copy of the grant, a copy of the title made by a clerk and attached to the proceedings that remain on file; it is generally stitched together in the form of a copy book, but is not always so, either at Hermosillo or in California. Witness's report was made up from notes taken in an actual examination of the archives. The *titulo* is a document signed by the governor intendant, the grant itself not containing the proceedings; if a copy of that is attached to the matrix, of course it should be an exact copy, but not signed, as it is not an original, the signatures being all copies; it is a rough copy attached by the clerk to the proceedings in making up the *expediente*, and very often the offers of sale for thirty days are set out in full in the *expediente*, whereas only a statement of the fact is sometimes made in the *titulo*. On recross-examination witness stated that such proceedings were accepted, although they were not full and perfect; to be regular, it should contain a copy of all the proceedings with the original title attached. (R., 11–17.)

SANTIAGO AINSA, the defendant, testified on his own behalf that he is an attorney at law, a Mexican, and understands the Spanish language; has made a very thorough examination for his own business of titles to lands in the present territory of Arizona issued by the preceding government. For fifteen years he has been *dabbling* in these grants, and has examined them in

Sonora and in Mexico very often. Witness identifies the *titulo* of the San José de Sonoita grant. As far back as 1879–80 he has seen it, when it was placed in his hands by the owner, Alsua; he examined it thoroughly, translated it, prepared the case for the surveyor-general's office, and presented the same there. Witness has made an examination of the signatures attached and says he believes them to be genuine; has seen the matrix or *expediente* of this title at Hermosillo, examined it there, and compared the *titulo* twice with the *expediente*, and believes the matrix to be true and genuine. The *testimonio* or *titulo* differs in some parts from the matrix or *expediente;* the location of the measurements is not in the *titulo*, and part of the sales is omitted, but this same omission occurs in a great many others. The granting clause at the end of the *titulo* is never to be found in the matrix or *expediente*, and there is no copy left. Sometimes you will find a sort of memorandum made out for the purposes of the clerk, drawing out what he should do, and from that copy is made the granting clause which is attached to the instrument which is delivered to the grantee; that copy is called a *borrador;* it is not in every grant, is not official, and has no existence in the law. The granting clause is never attached to the *expediente* in the archives, and if he found one so attached, it would seem very singular. Witness found no book in which was entered the *toma de razon* of this grant, and he searched very diligently for one several times and found none existing prior to the one commencing in 1831; there is only one book of *toma de*

*razon* in the office, which begins on October 24, 1831. (R., 17–20.)

GEORGE J. ROSKRUGE testified, on behalf of the defendant, that he was forty-eight years of age, resided at Tucson, his occupation being a surveyor for twenty-two years, and he has been living in Arizona for about twenty years. Has surveyed all over Pima county, and he surveyed what is known as the San José de Sonoita private land claim. Witness then described the manner in which he made the survey, to which the special attention of the court is called. (R., 21.)

It may be stated, in summing up the testimony of this witness, that with the title papers before him he paid some attention to the general courses named in the survey contained therein, but paid no attention to the distances or area mentioned therein; that his survey was made by triangulation, and that the map offered in evidence, showing the claim of the defendant, was made by scaling triangulations on a sectional map. He took part of the monuments from which the map was made because they answered the calls of the *expediente*, and he was satisfied they were the original monuments called for; otherwise he would not have taken them. The area surveyed was very much in excess of the amount called for, which was one and three-quarters *sitios*, and the objects which he designates as monuments were piles of stone, and that there were similar piles of stone all over the country. Ninety-nine per cent of the hills were covered with piles of stone such as he identified as monuments. (See his testimony, R., 34.) Witness took a

number of photographs of these various monuments, from which their character will fully appear, as they are on file with the clerk of this court. (R., 20–39 and 66–70.)

J. E. McGee testified, on behalf of the defendant, that he was forty-six years of age, and for a portion of the time he has been in Arizona he has lived on Sonoita creek, which runs through section twenty-two; lived there in 1877–78. Had heard of the abandoned San José mission, and from what he was told thought it to be located in section fourteen, township twenty-two, range fifteen east. On cross-examination witness states the ruins were scattered up and down the river for two hundred yards; he was first in the valley in 1875, and hunted for the grant monuments, but could not find them; the grant was talked about in 1875–76, and he had heard about it before it was filed with the surveyor-general; first heard of the old mission of San José in San Francisco, before he came there, by what he read in books. (R., 39–41.)

Defendant introduced in evidence (R., 41) what purports to be a correct translation of a copy of an indorsement which appears on the title papers of the Calabasas and Tumacacori grants.

Mr. Henry O. Flipper testified, on behalf of the government, that he is a civil engineer by profession, and is employed as a special agent of the Department of Justice in the office of the United States attorney for the Court of Private Land Claims. He had been employed for ten or eleven years in the survey of public lands in Mexico under concessions from the Mexican government,

and that he was familiar with the system of land surveying in Mexico, and had surveyed land grants in Arizona under the direction of the United States attorney. Among the grants he had surveyed was the San José de Sonoita, which he surveyed in 1892, and over again in 1894. In the survey of the San José de Sonoita he had a copy of the *expediente*, and went first to the point claimed to be the abandoned place of Sonoita. After a thorough examination of this point he was convinced it was not the abandoned place of Sonoita as described in the *expediente*, for the reason that the surveyor of the original grant described his starting point as a point where there were ruins and walls, whereas when he examined it he found houses that could not have been there in 1821. He took the course laid down on the claimant's map, and in the course chained sixty-three cords, described in the *expediente*, but found no monument. The end of this line was about three-quarters of a mile southwesterly from the northeast center monument as shown on map of claimants. The termination of the sixty-three cords was upon a *mesa*, or table land, where there was no valley and no spring, and for that reason he did not measure eastwardly, but did measure the twenty-five cords of the *expediente* westwardly in search of a monument, but found none. He searched over the surrounding hills and found no monument, though there is a white limestone hill such as found in the *expediente*.

From the point at the house he measured the full distance on claimant's map, three miles and seventy-three chains, but found no monument. Thence he went to

claimant's northwest monument, which is a small pile of loose stones, a foot or eighteen inches high and probably three feet across. Within fifty or one hundred yards of this pile of stones is another similar pile. They were upon a hill not unlike neighboring hills. The witness testified that there were a great number of just such piles of stones all over that section of the country, and that the general supposition was that they had been built by the Indians.

From the northeast center monument Mr. Flipper continued northerly to see how the country compared with the description of the *expediente*. Far from being rough and inaccessible, it is such as can be easily measured with a chain for fifteen miles or more, which led him to believe that it was not the land described in the *expediente*. Witness returned to the initial monument and measured thence easterly to the high hill. Two large monuments about a quarter of a mile apart were visible from the table-land below, and he measured the distance to determine which of them was claimed by claimants. The distance was one mile and forty-five chains, more than twice the twenty-five cords of the *expediente*. He counted fourteen piles of stones within a radius of a quarter of a mile of the monument.

If a parallelogram three hundred and fifty cords long by twenty-five cords wide, running northeast and southwest, with the north center monument as the center of the northeasterly line, were staked out, it would not conform to the claimant's survey. The monument marked "ledge" is uncertain, because there are several places or

ledges in the *cañon* that fill the conditions of the description in the *expediente*.

Witness found the southeast corner monument as claimed, but just across the creek from it are quite a number of similar piles of stones. He also found other ruins there, among them a trench some four hundred yards long, with a stone at each end sunk to the level of the ground, which was undoubtedly a place where the Indians played games, and all over that country were similar piles of stones.

Witness described the twin hills as being unlike others in the vicinity simply because they were close together. On one of these hills there is a pile of stones with a cactus growing upon it. The *expediente* states that a cross was placed at this point. (R., 42–53.)

R. R. RICHARDSON testified, on behalf of the United States, that he lives near Crittenden, in the Sonoita valley. Witness examines map handed to him, and says he went to the point marked on the map as "initial monument," to the top of the "white hill," and other corners. Was with Mr. Flipper and was also with Mr. Oury out there. Mr. Oury pointed out the point called the monument on top of the white hill, which was a pile of stones a foot or eighteen inches high and three or four feet across. There were many similar piles of stone in the vicinity and one or two within a hundred yards. Within a quarter of a mile there were quite a number. In going from the pile of stones pointed out by Oury to the initial monument, witness would pass by five or six similar piles of stones. Witness went to the "*casadero*" with Oury,

who pointed out a pile of stones there similar to the others; he pointed out the pile of stones that he had taken as the west center monument; it was located right at the side of the old trail which leads from the valley over toward Salero-Tubac. He has been over the trail a number of times. Going to the northeast center, as pointed out by Oury, he did not find anything along the route, but at the place there was an *adobe* house which belonged to Sanford. North and west from that point, Oury pointed out an old pile of stones as the corner, about the same as the other piles; saw three or four other piles of stones in the vicinity. The hill was a white hill covered with grass; the dead grass gave it its color. There were plenty more hills of the same character in the vicinity. At the point on the map marked as "chain of hills," witness went there with Oury and found another old pile of stones, no different from the others, and in the neighborhood saw quite a number of them, and only saw one close by. On the hills across the valley were quite a lot. There is no spring on the line drawn from the initial monument to the northeast center monument. There is water right in the Sonoita, perhaps a mile above; down in the river bed there is a place where the water comes up. He would not call it a spring where the water comes up from the bottom of the Sonoita. At the initial monument, marked on the map as the "abandoned place of Sonoita," there were a couple of *adobe* houses there when witness first saw it, with mud roofs, supported by cottonwood poles; they were modern buildings. Saw evidences of ruins on four or five acres—*adobe* walls

and stones, fallen down and washed; saw pottery in the neighborhood. There were quite a number of similar ruins in the vicinity. (R., 53–57.)

THOMAS HUGHES testified on behalf of the United States that he resides in Tucson and first went to the Sonoita valley in the summer of 1868 and lived there till 1883. Never heard of the abandoned place of Sonoita until about 1880, when the grant was filed before the surveyor general; nobody was in possession of the same then; there were three or four Americans there, but they were not claiming under any grant; thinks the valley was surveyed as public lands of the United States in 1878. People have made entries there under the public land laws and some of them have been patented. There was no one in the valley during the time he was there asserting any title over any portion of the same under any Mexican grant. Witness has not been there but two or three times since 1883. Has been assessor and collector of the county, and does not know of any settlement being made there under any grant claim. While he was living there, a surveyor, Mr. Harris or White, came to his house and asked if he had ever heard of the abandoned place of Sonoita, stating that he had been looking for it for two days at a time; witness told him he had never heard of such a place and does not know whether the surveyor afterwards found it or not. Witness has found old pottery over a large area where Indian villages have evidently been located, every place he looked within a half mile of the valley on both sides, and at these places the evidences of

ruins looked like old corrals and little houses. The landmarks of stone were some square and some round, and it was evident a large number of Indian families had lived there. He noticed a great number of places where they had evidently been grinding corn, and the stones were broken up, as if they had been attacked and cleaned out. (R., 57–60.)

CHARLES A. SHIBBELL testified, on behalf of the United States, that he had lived in Pima county since 1862, first going to the Sonoita valley in 1865, and lived there until August, 1868, when he was driven out by the Indians. When he went there, there was nobody living in the valley claiming to occupy the land under a grant. Knows the place where Wightman located and built a house (this is contended as the initial monument in this case); he has passed up and down the road by it quite often. When he first went there, about half a mile up on a hill there were some ruins of an *adobe* house of two rooms with a portal between them and a roof of modern construction. Does not know of any ancient ruins with pottery or old Indian villages. Saw piles of stone in several places as large as the counsel table and a foot or eighteen inches high, but did not think they were very numerous because he never paid much attention to them, and he accounted for them as having been built by the Indians; witness has seen ruins in a number of places along the valley towards the south. He was recorder of Pima county and states that the Sonoita grant was recorded in the records of that county in Book 3 of Old Records, pages 1 to 11, July 13, 1865, at 8 o'clock a. m. Witness states that

his testimony with relation to the appearance of the point termed the initial monument is based upon his knowledge of it as it was at the time he saw it, and he does not pretend to say what it was in 1821. He has not been to the point designated on the map as "a high hill," and does not know whether there is a monument there or not; does not know of the "*casadero*." Does not know whether there is a monument at the point termed "S. E. monument;" does not know anything about the monuments or the mountains to the northwest of the Santa Ritas. The Sonoita creek runs down the southwestern side of the mountain and rises down below old Fort Buchanan; the water rises below the road to Harshaw, between that place and the place called the initial monument; knows the San Cayantano mountain, which is sort of northwest from where the Harshaw road leaves the valley; the San Cayantano mountain is north of the Sonoita creek. (R., 60–65.)

The United States here offered in evidence the certificate of the treasurer general of the state of Sonora that the book of items and charges corresponding to the year 1821 does not exist in the archives. (R., 123.)

PETER R. BRADY testified, on behalf of the United States, that he knows the Sonoita valley and came down the valley in 1854, when he was a member of a railroad surveying party, and went down pretty much the length of the valley. At that time there was nobody living in the valley claiming under the San José de Sonoita grant or any other grant; there was nobody there at all. (R., 65–66.)

Defendant offered in evidence the testimony of Frank Oury, deceased, taken before the district court. It will appear from his testimony that he does not locate the monuments in this grant at the ends of the measurements called for in the *testimonio*, nor does he locate them at the same places as Mr. Roskruge.

In all of these surveys it may be noted that the distances called for and the amount of land specified seem to have been studiously ignored.

## BRIEF AND ARGUMENT.

In presenting this case, it is suggested that this brief will form the basis from which the briefs in the other Arizona cases, which are to be heard at this term, will be taken, and I deem it prudent to declare the fundamental principle to be, that a grant made by one without lawful authority therefor is void in all countries.

It is contended on behalf of the United States that at the time the grant in this case was initiated, and subsequent thereto, intendants did not have lawful authority to dispose of the vacant public lands. This court held in the case of UNITED STATES *v.* VALLEJO, 1 Black, 541, "That the decree of the Spanish Cortes of 1813, as well as all other laws of Spain in relation to the disposition of the Crown lands, were inapplicable to the state of things which existed in Mexico after the revolution of 1820, and could not have been continued in force there, unless expressly recognized by the Mexican congress," and not then without being essentially modified in their policies and purposes. It was also

expressly held by this court, in the case of MOORE *v.* STEINBACH (127 U. S., 70–81), that "the doctrine * * * that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him, does not aid their defence. That doctrine has no application to laws authorizing the alienation of any portions of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject."

While intendants and other officials (who were loyal to the new government) were continued in office according to the plan of Iguala and the treaty of Cordoba by the decree of October 5, 1821 (Reynolds, 95), still this does not go to the extent of continuing in full operation and without modification the laws of Spain in relation to the disposition of the public lands, and can only have reference to their functions of a political and executive character, and it in no wise militates against the general doctrine announced in the two decisions before referred to.

I shall attempt to show by the laws of Spain and Mexico the various officials and official bodies who were authorized to dispose of the public lands—lands of the empire and then lands of the republic; and I wish the court to observe that counsel for claimants in all of these cases ignore that period in the history of Mexico known as the empire, dating from the election of Iturbide as emperor on May 19,

1822, by the congress assembled on February 24, 1822, under the provisions of the plan of Iguala and the treaty of Cordoba. I seriously contend that this omission is not without knowledge of the existence of the epoch. A proper consideration and recognition of the existence of this government for the space of nearly one year, May 19, 1822, to March 29, 1823, will render untenable the position counsel are necessarily forced to assume in order to sustain the action of the officials as lawful.

The date which I adopt for the beginning of the investigation is that of the ordinance of intendants, December 4, 1786.

Article 1 of said ordinance divides New Spain into twelve intendancies, without including the Californias. (2 White, 67.)

Article 2 provides that the control of the royal treasury is to be given to the superintendent of the same. (Ibid., 68.)

Article 3 provides for the commissions of intendant general and provincial intendants, and is as follows:

> ART. 3. To the end that in no case and in no manner the superior authority which I have conferred and vested in my Viceroys may be confounded, I desire and command that the Viceroy of New Spain and his Successors in that Viceroyalty put their *Cumplase* (*Let it be complied with*) not only on the Titles of the Intendants which are issued to those of the Provinces included in the district under their command as they do on those of their Governors, but also on that which may be issued to the Intendant-General of the Army and of the Royal Treasury of said Kingdom; but this latter must also afterwards put it on the Commissions of the Provincial Intend-

ants as Superintendent of my Royal Treasury, inasmuch as they are to be subordinate to him in everything relating thereto, as provided in this Ordinance and as was indicated in the preceding Article. For the same reason said Superintendent shall also put his *Cumplase* (*Let it be complied with*) on the Commissions that may be issued to the Intendants of Arizpe and of Durango, and when presented in this condition to the Commandant-General of the Frontiers he shall likewise put his upon them, note being first taken of them in the Office of the Auditor of Accounts in Mexico, as well as of others in their time, and of both afterwards in the Offices of the Principal Auditors in the Provinces to which they severally belong.

Article 4 authorizes the creation of the superior board of the treasury at Mexico.

Article 5 provides for substitutes on the board in case of absence or inability of any of the members to act.

Article 6 prescribes the times of meeting and functions of the superior board of the treasury. (Ibid., 68.)

Article 7 defines the jurisdiction and powers of the intendants in the four cases of justice, police, treasury, and war. (Reynolds, 59.)

Article 10 provides for the political and military governments that remain in existence. (Reynolds, 60.)

Article 81 defines the powers and duties of intendants in the matter of the sale, composition, and distribution of the public lands. (Reynolds, 60, 61.)

Article 105 provides for the establishment of provincial boards of the royal treasury, and is as follows:

ART. 105. Extraordinary expenditures of the character indicated with respect to each Intendancy

shall be passed upon by a Provincial Board of the Royal Treasury which, for the purpose of considering them, and of determining the causes that require them, shall be established in its capital, and be Composed of the Intendant, his Acting Legal Adviser, the Principal Officers of the Royal Treasury, and his Attorney-General with a vote in the cases in which he does not officiate as a party, preserving in their seats the order in which they are named; and, together with a *testimonio* of the proceedings, the Intendant shall make a report to the Superior Board in Mexico, through the Superintendent Subdelegate as its President, in order that it may, after having seen and examined the points therein with the attention that is due and which the Laws recommend, decide what it may judge most convenient, and in consequence thereof issue the corresponding order that the expenditure consulted about and its payment by the proper Treasury may be made, or be disallowed in case said Superior Board so determines.

Article 164 provides for a provincial board of sales in the capital city, and is as follows:

ART. 164. To the end that what has been ordered in the two preceding articles may have all the effect desired, the Board of Sales in the Capital at Mexico shall continue, proceeding in its functions in accordance with laws 2 and 3, title 25, book 8, of the *Recopilación* (Compilation), and being composed of the Intendant-General, the junior Judge of that Audience, the Attorney-General of my Royal Treasury and the Auditor and Treasurer, Officers thereof; and a similar Board shall be established in the Capital of each one of the other Intendancies, that of Guadalajara being composed of the same officers respectively as in Mexico, while there is an

> Audience at that place; and in the others the Intendant, his Acting Legal Adviser, the Officers of the Royal Treasury and a Defender thereof whom the Intendant shall appoint, both preserving in their seats the same order in which they are named; and in case, in that of Mexico or Guadalajara, because of absence, sickness, or failure of the Intendant, his Acting Legal Adviser attends, he shall take his seat after the Attorney-General and before the Offices of the Royal Treasury. And the said Boards and Sales shall be held necessarily in the very houses in which are the officers of the Auditor and the Treasury of my Royal Exchequer, in order that the attendance of their Chiefs may be compatible with the importance of their not abandoning them.

This ordinance was modified by the royal decree of March 23, 1798 (Reynolds, 65), and the causes for the modification are to be found in the communication and orders of October 22, 1791 (Reynolds, 62), and January 19, 1793 (Reynolds, 63), together with the communications mentioned in the body of the decree.

The same was further modified by royal decree of February 14, 1805. (Reynolds, 68–75.)

On August 29, 1805, Viceroy Iturrigaray, under the instructions of the superior board of the treasury, promulgating regulations for the government of intendants, stated that the King has prescribed in the decree of February 14, 1805 (*supra*), that the owners of land should have one year within which to settle and cultivate the lands that were uncultivated and vacant, with the understanding that they should otherwise revert to the

public domain and vest in and be adjudicated to whoever might denounce them. (Reynolds, 76–77.)

This system for the disposition of the public lands was changed by the constitution of March 18, 1812 (Reynolds, 79), and by the law of the cortes of January 4, 1813 (Reynolds, 83), passed in pursuance thereof, providing a different method for disposing of the public lands. A central council of government had been formed, and recognized the regency, and the latter, in its efforts to resist the French invasion, decided to summon the people in an election of an extraordinary cortes, which was installed September 24, 1810, and on March 18, 1812, promulgated the constitution referred to, and on January 4, 1813, the cortes provided by decree for the disposition of the public lands in the Spanish dominions to private individuals and to the defenders of the country. (Reynolds, 30.) By this constitution and decree we have an entirely different system provided for the disposition of the public lands, and it can hardly be contended that both the new and old systems were in operation at the same time. It is a general rule, recognized by the civil-law, that a posterior repeals an anterior law on the same subject, although the prior law may not be referred to by way of express repeal. (Smith's Civil Law of Spain and Mexico, p. 100; Escreche's Elements of Spanish Law, translated by Bethel Lockwood, 1886, p. 27.) The regency and the cortes were acting for the King, Ferdinand VII, in his enforced absence from the realm.

Ferdinand VII, however, returned to the throne, and on May 4, 1814, at Valencia, issued a decree in which he

refused to recognize the existing order of things, declared the constitution of 1812 revoked, and issued various subsequent decrees designed to restore all offices and officials as they existed prior to the constitution of 1812.

The universal ministry of the Indies was restored June 28, 1814. (2 White, 155.)

The royal and supreme council of the Indies was restored on July 2, 1814. (2 White, 156.)

On December 28, 1814, the King issued a royal *cédula* or edict, the ninth article of which is as follows (1 White, 168):

> 9. The governor-intendants shall resume all the powers appertaining to them before the promulgation of the constitution, so called; and shall consequently exercise said powers, as well in matters of government as in those of economy and litigation relating to the royal treasury, agreeably to the laws and ordinances respecting intendants.

This decree shows that the ordinance of intendants had been derogated, presumably by the constitution of 1812, which abolished the system of government now restored by this decree.

Mr. Hall, in his work on Mexican Law, section 188, page 76, says:

> By a resolution of the council of the Indies, before a full board at Madrid, on the 23d of December, 1818, and approved by the King, it was declared that all business pertaining to the alienation of land in New Spain should belong to the department of the office of the treasury of the Indies, at Madrid. This was probably issued on

account of the revolutionary condition of Mexico at that epoch, as this was by three years prior to the independence of the Mexican nation.

He also adds a footnote, which is as follows:

And yet it does not appear that the *cédula* of 1754 or ordinance of December 4, 1786, was ever repealed.

The author evidently overlooked the principle announced with reference to the effect of the promulgation of a posterior law upon an anterior law covering the same subject-matter. Appreciating the fact that if Mr. Hall was correct as to the promulgation of such a decree it resulted that the officers in New Spain were deprived of any authority over the public lands, I deemed it prudent, not to rely alone upon his statement, and therefore, through the proper official channels, I obtained from the City of Mexico a certified copy of this decree, translation of which is as follows:

General and Public Archives of the Nation. Mexico.

I, Justino Rubio, Keeper of the General and Public Archives of the Nation, certify:

That, in compliance with the superior order of the Department of Affairs, dated April 12th 1894, search has been made, in these General Archives under my charge, for the Royal Order of December 23rd 1818, at the request of the Minister of the United States of America, and, having been found in volume No. 219, of the Division of Royal Cedulas, page 382, the present copy is made, said Royal Order being literally as follows:

Royal Order. Note replied to in No. 757 of the 31st of May, 1819, No. 382.

Most Excellent Sir: To the consultation of the Supreme Council of the Indies, in full council of three Chambers of the 13th of the month last passed, after examination of all the prior circumstances of the matter, his Majesty has been pleased to declare that all matters relating to the sale of lands in those dominions belong to the Department of the Exchequer of the Indies under my charge.

Which by royal order, I communicate to your Excellency for compliance therewith.

God preserve your Excellency many years.

Madrid, December 23d 1818.

JOSÉ de YMAS. [A rubric.]

Viceroy of New Spain.

Mexico, March 9th 1819. Acknowledge receipt of this Royal Order, reply that it is understood, and circulate it to whom it may concern.

DEL VENADITO. [A rubric.]

It was circulated on the 4th of June in print.

Agrees with its original which exists in the above mentioned volume of the Division of Royal Cedulas, in these General Archives, and in witness thereof, wherever and whenever necessary, I give the present certificate, in Mexico, on the thirteenth of April, eighteen hundred and ninety-four.

JUSTINO RUBIO.

I have no doubt the reason given by Mr. Hall for the promulgation of this decree was correct. But if such were not the case, I am satisfied that the authority exercised by the intendants under the ordinance of 1786, and its modifications made from time to time, ceased to exist in 1820.

Under pressure from the people, the King in 1820 adopted the constitution of 1812, and took the oath to support it, and thus again the ordinance of intendants was repealed, because repugnant to the provisions of this constitution, as was the case in 1812, when the constitution was first promulgated. (Upon the reestablishment of the monarchy, in 1814, and setting aside the constitution of 1812, Ferdinand VII recognized that the ordinance of intendants had been abolished by virtue of the provisions of the constitution when first adopted, and hence it was necessary for him to issue the decree of December 28, 1814, supra.) The officers created in virtue of that constitution were reestablished, and also the various decrees prescribing their functions and duties. These decrees are found in "Micelanea Constitucional," vol. 2, "Colección de los Decretos Dictados por El Rey, desde 9 de Marzo Hasta 9 de Julio del Año de 1820, Con El Objeto de Restablecer la Constitución Política de la Monarquia Española, por El Lic. Juan Francisco de Azcárate, Méjico, 1820, en la imprenta de D. Alejandro Valdes," and translation of them is as follows:

Decree of March 6, 1820.

To the Department of Grace and Justice:

My royal and state councils having represented to me how important it would be to the welfare of the monarchy to convene the cortes, approving their recommendation, because it conforms to the observance of the fundamental laws which I have sworn to uphold, I desire that the cortes be convened immediately, to which end the council will

dictate such measures as it considers proper, that my wishes may be realized and that the lawful representatives of the people invested with the necessary powers in conformity with those measures may be heard, so that everything required by the general welfare will be agreed upon, with the certainty that they will find me prompt in whatever is demanded by the interests of the state and the well-being of a people who have given me so many proofs of their loyalty, for the success of which my council will consult me on all doubts that occur to it, so that there may not be the least difficulty or delay in its execution.

You will see that it is understood, and give the necessary orders.

Decree of March 7, 1820.

To the Department of State:

To avoid the delay that might arise on account of the doubts that might occur to the council in the execution of my decree of yesterday for the immediate convocation of the cortes, and such being the general will of the people, I have decided to take the oath to uphold the constitution promulgated by the general and extraordinary cortes in the year 1812.

Decree of March 9, 1820.

To the Department of State:

The King, Don Ferdinand VII, by the grace of God and the constitution of the Spanish monarchy, has issued the following decree:

Having decided, by the decree of the 7th inst., to take the oath to uphold the constitution promulgated at Cadiz, by the general and extraordinary cortes, in the year 1812, I have concluded to take the oath, *pro tempore*, before a provisional council

(*junta*) composed of persons who enjoy the confidence of the people, until said oath can be solemnly taken before the cortes, which I have ordered convoked in conformity with said constitution and in the manner therein provided. The individuals designated for this council are the Reverend Father in Christ Cardinal of Borbon, archbishop of Toledo, president; Lieutenant-General Don Francisco Ballesteros, vice-president; the Reverend Bishop of Valladolid de Mechoacan, Don Manuel Abad y Queipo, Don Manuel Lardizabal, Don Mateo Valdemoros, Don Vicente Sancho, the colonel of engineers, Count of Taboada, Don Francisco Crespo de Tejada, Don Bernardo Tarrius, and Don Ignacio Pezuela. All the dispositions that emanate from the government, until the constitutional installation of the cortes, shall be submitted to this council (*junta*) and promulgated with its approval.

You will see that it is understood in all the kingdom, to which it will be communicated for prompt and immediate promulgation and observance.

Decree of March 9, 1820.

To the Department of Grace and Justice:

In order that the constitutional system which I have adopted and sworn to support may have the rapid and uniform development that is expected, I have resolved, after hearing the council and approving its recommendation, that elections be held for *constitutional alcaldes* and common councils immediately in all the towns of the monarchy, in strict conformity with the provisions of the political constitution sanctioned at Cadiz and with the decrees that emanate therefrom and establish the manner and form of holding said elections.

You will see that it is understood, and give the necessary orders for its observance.

These decrees put matters in 1820 back where they were in 1812. As the constitution abolished the intendants absolutely, either the disposition of lands reverted to the provincial councils under the decree of January 4, 1813, or there was at that time no official or official body with authority therefor. The next epoch of the government begins with the declaration of independence on February 24, 1821, in the form known as the Plan of Iguala. This revolution was successfully terminated and the declaration of independence made good by the revolutionary forces under general Iturbide entering the City of Mexico on September 27, 1821. During the period between the promulgation of the Plan of Iguala as the declaration of independence and the capitulation of the City of Mexico on that date, the treaty of Cordoba was signed by viceroy O'Donoju and general Iturbide, dated August 24, 1821, looking to the independence of Mexico. This treaty, however, was afterwards rejected by the Spanish government. The plan of Iguala has but little bearing upon these questions, except the thirteenth article thereof, which says, "Their persons and property shall be respected," referring to the preceding article thereof, which is in regard to the inhabitants of the empire who were declared to be citizens. It may be remarked that this provision is only declaratory of what is recognized by all civilized nations without any specific announcement to that effect.

The declaration of independence having been made good by the capitulation of the City of Mexico, it is contended on behalf of the government that all authority existing

in or exercised by officials for the disposition of the public lands ceased to have any further life unless specifically continued in force. On October 5, 1821, an order was promulgated by the provincial council of the empire, as follows (Reynolds, 95):

> The sovereign provincial council of government of the empire of Mexico, considering that from the moment it solemnly declared its independence from Spain all authority for the exercise of the administration of justice and other public functions should emanate from said empire, has seen fit to habilitate and confirm all authorities as they now are, in conformity with the Plan of Iguala and the treaty of the village of Cordoba, for the purpose of legalizing the exercise of their respective functions.

It will be seen by this decree that it was understood by all the officers that the offices and powers that had theretofore existed ceased from the date of the declaration of independence, February 24, 1821, which is in harmony with the decisions of this court in *United States* v. *Vallejo* (1 Black, 541) and *More* v. *Steinbach* (127 U. S., 71–80), before referred to, and in *Leese & Valejo* v. *Clarke* (3 Cal., 17–23), wherein the court says:

> On the 24th of February, 1821, the relation between Mexico and Spain ceased, and the sovereignty became vested in the Mexican nation; and since that time no valid alienation could be made in any of the territories of Mexico except by an act of Mexican sovereignty. The royal decrees, regulations, and usages ceased to have any effect whatever as to subsequent grants of lands.
>
> This point was determined by the Mexican congress in a case which arose shortly after the independence of the government, and has ever since

been acquiesced in. On the 17th of January, 1821, the elder Austin obtained an inchoate grant of lands from the royal governor of Texas. On the 19th of August the Mexican governor of that province (Martinez), assuming the powers properly exercised by the royal governors, modified the grant in favor of the younger Austin.

Had the royal laws and usages still continued to retain their force, the acts of Martinez would have been valid, but the Mexican government, at the same time it recognized the act of the royal governor as valid, because done before the change of sovereignty, refused to confirm the act of its own governor, done after the change, on the ground that the sovereignty could be exercised only by the Mexican nation. The subject attracted public attention, and the Mexican congress were about passing a general law in relation to the alienation of public lands when Iturbide forcibly dispersed the members of that body and caused himself to be proclaimed emperor.

But, as suggested in the earlier part of this brief, this decree does not continue in force the laws for the disposition of the public lands, whatever they may have been. However, if such an extreme construction were placed upon this decree as to hold that the laws for the disposition of the public lands, as they existed at the date of independence, were continued in full force, it is clear that the ordinance of intendants ceased to exist upon the readoption by Ferdinand VII of the constitution of 1812.

The provincial council, provided for by the Plan of Iguala, consisting of thirty-six members, was at once formed, and appointed a regency of five persons, with general Iturbide as president and commander in chief of the army and navy. A congress was elected on February

4, 1822, which took the place of the provincial council, and proceeded with the formation of a new constitution. A struggle commenced between that congress and general Iturbide which culminated in the election of Iturbide as emperor on May 19, 1822, and he was crowned on July 1, 1822. (*Leyes Fundamentales*, 92–93; Reynolds, 31–32.)

On October 30, 1822, emperor Iturbide dissolved that congress by force and created in its place the national instituent council, which was installed November 2, 1822. This instituent council on January 3, 1823, provided for the disposition of the public lands by what is known as the colonization law of Iturbide, and on the next day it was promulgated by emperor Iturbide. (Reynolds, 100-105.) This law provides for two kinds of grants—one to promoters (*impressarios*) who should bring two hundred families under contract, and the other to individuals, which were to be made by the common councils (*ayuntamientos*). The provisions for grants of land to be made by the *ayuntamientos* had its origin in the constitution of 1812, wherein the manner of disposing of lands through these bodies originated. I do not believe that it can be successfully shown that this law did not by virtue of its terms and its departure from the old laws necessarily repeal them *in toto*.

Thus we have four distinct departures from the ordinance of intendants; so that at this time, whatever they may have claimed for themselves, the intendants could not claim any lawful authority to interfere with the disposition of the public lands of the empire. These departures are:

1. By the adoption of the constitution of March 18, 1812, and the promulgation of the law of January 4, 1813. (Reynolds, 79–87.)

2. By the resolution of the council of the Indies, before a full board at Madrid, December 23, 1818. (Hall's Mexican Law, sec. 188, p. 76.)

3. By the decrees of Ferdinand VII reestablishing the constitution of 1812 and convoking the cortes, March 6, 7, 9, 1820. (*Supra.*)

4. By the imperial colonization law of January 4, 1823, above referred to.

Emperor Iturbide and his government commenced to go out of existence by the decree of March 31, 1823, upon the reassembling of the old congress, wherein it was declared that the executive power in existence in Mexico since the 19th of May last (1822) until that time ceased (Reynolds, 106), and on April 8, 1823, the congress declared that the coronation of general Iturbide was an act of force and violence and therefore void, and they provided for his enforced departure from the nation. (R., 107.)

On April 11, 1823, the constituent congress instructed the executive to take no further steps in relation to the colonization of the public lands until a law on that subject should be enacted by the instituent council. It would seem most reasonable that, owing to the chaotic condition of the government, such a decree was prudent and was intended to withdraw from all the officials any power to dispose of the public lands, including the chief executive power. On January 31, 1824, the constituent

congress promulgated what is known as the constitutive act, under which the government was to continue until the new constitution was framed and established. Article 1 provides that "The Mexican nation is composed of the provinces comprised in the viceroyalty formerly called New Spain, in what was called the captaincy-general of Yucatan, and in the commandancies-general of the internal provinces of the east and of the west." (Reynolds, 116.)

Article 7 designates the states which compose the federation. (Reynolds, 116.)

This article is the beginning of the subdivision of the nation of Mexico which has given rise to a very great deal of spirited contention as to the origin of the rights of the states as they are finally defined under the constitution.

On August 4, 1824, the constituent congress promulgated a law classifying the revenues, which contains twenty-two articles. The first ten of these define the revenue that shall be retained by the nation.

Article 11 provides that "the revenues not contained in the foregoing articles belong to the states."

Article 9 is as follows:

> National property, in which is included that of the inquisition and temporal property of the clergy, or any other rural or urban property that belongs or shall hereafter belong to the public exchequer.

This article, I contend, reserves the public lands to the nation, if they were intended to be included in the revenues, which I seriously doubt.

On August 18, 1824, what is known as the colonization law (Reynolds, 121) was passed, the second article of which is as follows:

> The object of this law is those lands of the nation which, not being private property nor belonging to any corporation or town, can be colonized.

The third article is as follows:

> For this purpose the congresses of the states shall enact as soon as possible laws or regulations for the colonization of their respective demarcations, in strict conformity with the constitutive act, the general constitution, and the rules established in this law.

These two articles are inconsistent with the construction sought to be placed upon articles 9 and 11 of the decree of August 4, 1824, classifying the general and special revenues. If the vacant public lands of the nation within the states had been transferred to them by any provision of this law, there would have been no necessity for the declaration made in the second article of the colonization law.

The third article of this law (*supra*) confers upon the states the right only to *regulate* the colonization of the public lands of the nation lying within their respective demarcations, subject to the control of the nation itself, as expressed in the constitutive act, the constitution, and the rules established under this law, and subject necessarily to the future control of the sovereign will of the nation. This is the only declaration wherein the nation delegated to the states any rights or powers over the

vacant public lands, and, as will be observed, it is not of such an unlimited character as would pass to the states the title thereto, but simply authorized them to regulate the colonization thereof, subject to the right of the national government, and as its agent, if I may use that term. There is no inference in this law that the state could dispose of any portion of the lands for the purpose of its revenue, and if the state did from time to time seek to pass the absolute title to any portions of the same by sale of the land for revenue it was without authority and in excess of the powers conferred on it, to wit, to regulate the colonization of the national public lands within their demarcations under the control of the national government.

On September 21, 1824, the office of commissary-general was created. The law is as follows (Reynolds, 123):

> ARTICLE 1. So far as concerns the federation, the officers of general and local depositories, and all revenue employes that have been retained by the federation, are discontinued.
>
> 2. From the intendants and other discontinued officers the government shall appoint, in each state where it appears necessary, a commissary general for the different branches of the exchequer, public credit, and war.
>
> 3. These commissaries shall be, in the state or states and territories of their demarcation, head officers of all branches of the exchequer. Consequently they are responsible for the prompt execution of the laws that govern their administration, and all employes thereof shall be subordinate to them.

4. They shall collect and disburse, under the laws and orders of the government, the proceeds from the revenues and contingents of the state.

5. The revenue on powder, salt deposits, the proceeds from the revenue on tobacco that belong to the federation, national properties and vacant lands (*cascos*), contingents, customs, tolls, and all the branches pertaining to the public credit, shall be administered directly by the commissary. The revenue on tobacco in the places where raised, that from the maritime customs, from the mail and lotteries, shall continue under their special administration, subordinate in all respects to the commissaries.

Under the former laws which we have been investigating the intendants were continued as the auditing or fiscal officers in the various provinces, but the power to dispose of the public lands had, as we have seen, been taken away, and the creation of the office of the commissary-general, conferring upon him very much the same powers and duties as were exercised by the intendants, nowhere even impliedly recognized the power to dispose of the public lands of the nation, or to make composition with parties who had attempted to acquire the lands from other officials, or to extend titles for lands based upon proceedings (*expedientes*) taken by other officials prior to the creation of his office; nor is there anything in this law of such a general nature and character as would permit him to make an admission against his government. He was purely and simply a revenue officer to disburse the revenues which might come to him through sources named in the law.

It is not shown what formal proceeding was necessary to be taken in order that a commissary-general, might extend a title, and if the contention made by counsel for appellants in the state grant cases, that the title to the vacant public lands passed to the states by virtue of the act of August 4, 1824 (Reynolds, 118), upon what ground can it be contended that the commissary-general, created by the law just quoted as purely and simply a revenue officer, could dispose of the public lands of the nation within the demarcations of the states for any purpose?

I think that my construction of the powers of the commissary-general in relation to the disposition of the public lands of the state is correct, for the reason that the vacant public lands within the states were not intended at that time to be disposed of by either the nation or state for revenue, but it was the intention of the nation to retain them for colonization, which was to be regulated as to all the vacant public lands within the demarcations of the respective states by the states themselves, but under the control of the national government, as fully appears by articles one and three of the colonization law of August 18, 1824. (Reynolds, 121.)

Juan Miguel Riesgo, the commissary-general of the national government assigned to the state of the occident, must have known of the existence of the law creating his office, and on May 15, 1825, must have thought he understood its provisions and the powers conferred upon him; but it is apparent that he did not believe that the decree of September 21, 1824 (creating the office of commissary-general), authorized him to extend title in

this or any other case, otherwise he would have recited in the preamble attached to the *testimonio* in this case or in the grant itself that he claimed some right to perform this act in 1825 by virtue of this law. He adds a statement, however, which appears both in the preamble and in the granting clause, that he draws his authority from article 81 of the ordinance of intendants of December 4, 1786, and the royal instructions of October 15, 1754, and I am satisfied that we have clearly shown that in 1825 the ordinance of intendants had long ceased to be in force in Mexico.

I have already called attention to four departures from this ordinance of intendants, and I now desire to call attention to the fifth departure therefrom, which was by the decree of August 18, 1824, the sixteenth article of which is as follows (Reynolds, 122):

> 16. The government, under the principles established in this law, shall proceed to the colonization of the territories of the republic.

The regulations which the chief executive was to issue under this law for the colonization of the territories were not issued until November 21, 1828. (Reynolds, 141.) The third article of the colonization law delegates to the states the power to regulate the colonization of the public lands in strict conformity with the constitutive act, the general constitution, and the rules established in that law, and necessarily subject to the control of the national government.

It is contended by counsel for appellants, under the sixteenth heading of his brief, page 21: "The commissary-general was the head officer of all the branches of

the Mexican exchequer (treasury). Decree of September 31, 1824." (Reynolds, 123.) This proposition is to be qualified for the reason that he was the fiscal officer of the Mexican nation in the state to which he might be assigned, but the chief officer of the Mexican exchequer was "*La Secretario del Despacho de Hacienda.*" Article 96 of the instructions of December 22, 1824 (referred to by counsel in his brief), is as follows (2 Galvan Neuvo Colleccion de Leyes y Decretos Mejicanos, p. 847):

> *La secretaria del despacho de hacienda, es el conducto por donde los commisarios generales se han de entender con el supremo gobierno, en todo lo que va prevenido en esta instruccion y se ofresca relativo a sus funciones y atribuciones.*
>
> The secretary of the department of the treasury is the channel through which the commissaries-general are to deal with the supreme government in everything that is provided in this instruction, and that course with respect to their functions and powers.

The second proposition announced is: "The instructions issued to the commissaries-general, December 22, 1824, authorized him to issue final title to this grant," and he cites 2 Galvan, etc., 836–846. I can not concur in this proposition, either as contained in express terms in said instructions, or agree that the same can be inferentially concluded from anything contained therein. Certain articles of those instructions are found in translation on pages 49–50 of appellant's original brief in this case. Although the translations are rather free, still I contend there is nothing in them to justify the conclusion that the commissary-general was authorized to issue final title for this or any other grant of land.

As explanatory of the powers and duties of the various commissaries-general there were issued by the secretary of the department of the treasury on March 5, 1825, blank forms for monthly and quarterly reports of the receipts and disbursements of that officer and as to all moneys received from the sources over which his office exercised jurisdiction. These forms were issued by Esteva, secretary of the treasury, the same officer who issued the instructions of December 22, 1824, referred to by counsel, and will be found in 2 Galvan, etc., 269–276. On page 276, under form No. 6, one of the items upon which the commissary-general was required to report was "*bienes y fincas nacionales.*" If counsel for appellants should contend that these words will include the receipts from the sale of the vacant public lands, there would be more foundation for their contention that the commissary-general was authorized to dispose of the public lands and that his authority therefor was to be found in this recital than by virtue of the instructions issued by the secretary of the treasury on December 22, 1824; but a consideration of the fact that the vacant public lands were set aside for colonization, and not revenue, by the law of August 18, 1824, under the direction of the chief executive when located in the territories, and under the laws of the states when located within their demarcations, forces the conclusion that such a provision in these reports could only have reference to the possibility that the national government might thereafter, as it had authority to do, provide for the sale of any of these public lands, and if it did so the proceeds would come

into the hands of the commissary-general to be accounted for to the secretary of the treasury, if the vacant public lands were subject in any manner to the provisions of the revenue law. Thus my construction is borne out by the subsequent action of the Mexican nation when it created a general department of revenues by the decree of January 26, 1831 (Reynolds, 151), establishing commissariats and commissaries by the decree of May 21, 1831 (Reynolds, 153), and issued regulations for carrying them in effect on July 7 and July 20, 1831 Reynolds, 155–161).

In my brief in the case of *United States* v. *Coe*, argued at the last term of this court and remanded to the docket for reargument, being No. 8 on the present call, these laws and regulations are referred to and discussed (pp. 91–95). It will there appear that in these laws and regulations the sale of the vacant public lands as such is not provided for, but if they form part of the revenues or part of the property assigned to the treasury for the purpose of obtaining revenues, then they fall within the general provisions of these laws, but if they are still withheld for the purpose of colonization alone, then in no sense did they come within the jurisdiction of the revenue department or its officials. The decree of April 6, 1830 (Reynolds, 148), in relation to colonization and commerce, convinces me that the national government at that time did not consider the vacant public lands as part of the revenue system, but a part of the colonization system; and, desiring to resume unlimited control over the same, sought to get the consent of the states to a release of

their right to *regulate* the colonization of the public lands within their demarcations, which they had acquired by virtue of the third article of the colonization law of August 18, 1824. Whether the consent of the states was obtained or not, by virtue of its sovereign power reserved over the lands at the time the right to regulate colonization thereof within the restrictions prescribed was given to the states, the national government proceeded to carry all of the property of the nation into the revenue system by virtue of the law of January 26, 1831.

Putting the most liberal construction upon all the laws and regulations that could possibly have reference to the public lands, I am unable to understand how the construction is to be drawn therefrom that the commissary-general, on May 15, 1825, the date of the issuance of final title in this case, had power to issue titles in the name of the republic of Mexico, based upon old *expedientes* that had been formed by officials under another government, and after their powers over lands must necessarily have ceased either by operation of law or by direct repeal.

Recurring again to the proposition that between August 18, 1824, the date of the colonization law, and January 26, 1831, the date of the decree creating a general department of revenues, the vacant public lands of the nation situated in the territories and states were subject alone to the terms of the colonization law, I respectfully refer to the instructions of December 22, 1824, so much relied upon by counsel in this case. Article 5 thereof provides:

> There shall be established commissariats-general in the States of Queretaro, Chihuahua, Coahuila, and

> Texas, whose capital is Saltillo; New Leon, Tamalupias, Tabasco, and the territories of Upper and Lower California and Santa Fe of New Mexico, and the government shall prescribe the terms in which they are to be conducted.

It is perfectly well understood that in the territory of New Mexico and in the Californias the public lands were not considered, at least after August 18, 1824, as forming any part of the revenue system of the Mexican republic, and on November 21, 1828, the executive provided the rules and regulations for the disposition of the public lands within these territories and conferred the right not upon the commissaries, but upon the governors and territorial deputations, and there is no more ground for contending that the vacant public lands constituted a part of the revenue system of the national government when they were located in the state of the Occident than when they were located in the territory of New Mexico. Before the authority of Juan Miguel Riesgo, commissary-general assigned to the state of the Occident, to extend this title is recognized by this government it should be made to appear that he had some reasonably well-defined law, order, or decree sufficient for that purpose. The first subdivision of section 13 of the act creating the Court of Private Land Claims and conferring jurisdiction upon it provides that "no claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the states of the republic of Mexico having lawful authority to make grants of land," etc.

I have undertaken to ascertain and determine, as best I could, the various officials and official bodies who were clothed by the laws and regulations with power to bind the existing Mexican government in the disposition of its public lands, from December 4, 1786, to January 26, 1831. Testing the foregoing investigation by the general rule of law that a grant made by one without lawful authority to make it is void in all governments, and by the limitations placed upon the judicial branch of the government by congress in subdivision one of article 13 of the act of March 3, 1891, the action of Juan Miguel Riesgo in extending this title should be pronounced a nullity.

The petition for this grant (R., 117) is directed to the intendant governor and is undated, but the order of the intendant is dated at Arizpe, May 29, 1821, three months after the declaration of independence at Iguala. The various steps set out in the proceedings conform substantially to those appearing in nearly all of the grants initiated about that time, and if, as contended by counsel for appellants, the ordinance of intendants was still in force, the proceedings had not reached such a stage under that ordinance as to vest an equity in the petitioner upon which he could, as a matter of right, demand a title from either the Spanish or Mexican governments. It is contended that upon the third offer of sale (*almoneda*) the payment of the purchase money vested an equity in the petitioner upon which he had a right then and has a right now to demand the title. It is the contention of the Government, that no equity vested in

the petitioner after the purchase money was paid, nor until the *expediente* had been forwarded to the superior board of the treasury and approved by it. Upon that approval taking place, an equity vested only so far as the proceedings had been approved by the superior board of the treasury, and the money which had been paid to the intendant was subject to be refunded upon its disapproval. In the "Official Report on the Condition of the Archives or Records of the Title to Land Grants in Arizona," etc., made by Special Agents Will. M. Tipton and Henry O. Flipper, 1896, page 93, No. 152, San Rafael de la Noria grant, proceedings were begun on March 29, 1813; the *expediente*, regular in form, was ordered to be sent to the superior board of the treasury in Mexico on November 19, 1813; September 16, 1816, the intendant sent it to the commandant-general at Durango, and in October of the same year it was sent to the viceroy at Mexico; November 22, 1816, the viceroy referred it to the attorney of the royal treasury; December 31, 1816, the attorney recommended that the *expediente* be approved for four *sitios* instead of five, as the amount of land was limited to four *sitios* for one person, and husband and wife were one; the viceroy then referred the *expediente* to the superior board of the treasury, which approved it March 13, 1817; it was then sent back to the intendant at Arizpe and proceedings had to segregate the four *sitios* from the original five and pay back the value of the one rejected. A part of this *expediente* is missing, and the final result could not be determined.

Referring to the ordinance of intendants, it appears that originally article 81 (Reynolds, 60, 61) provided for two transmittals to the superior board of the treasury: First, the *expediente* should be transmitted for approval, or for such action as it might deem proper to take, before any title could possibly be issued. No equity could vest in the petitioner at that time because the whole proceeding was subject to be disapproved and annulled, which is inconsistent with the idea of a complete vesture of an equitable interest upon which a right could be based. If the *expediente* was approved it was returned to the intendant, title was issued, and a *testimonio* of the *expediente* attached, forming a *titulo*, which was returned to the superior board of the treasury for its approval, and if again approved, returned to the intendant in order that a *toma de razon* might be taken, and then delivered to the party as evidence of title. The amendment made by the decree of March 23, 1798, dispensed with the second transmittal in cases where the value of the land did not exceed two hundred dollars, upon the payment of a two per cent tax, but the first transmittal was not to be excused and was made mandatory before any title should issue. This was reaffirmed by the decree of February 14, 1805.

The *expediente* in this case appears to have been concluded on December 12, 1821 (R., 21), and if the intendants were still recognized as having authority to exercise the powers conferred upon them by the ordinance of intendants, and if the superior board of the treasury was still in existence and capable of exercising its func-

tions, as contended by counsel for appellants, no reason whatever is shown why this *expediente* could not have been transmitted to the superior board for approval.

It is contended by counsel that it was the duty of the intendant to transmit the *expediente* to the superior board of the treasury, and that his failure to do so could in no wise prejudice the petitioner. Admitting that the failure of the intendant to transmit the *expediente* to the superior board of the treasury for such action as might be deemed proper in the premises did not prejudice the petitioner, still this failure could not supply the action required by law to be taken by the superior board. If an equity vested in the petitioner upon the conclusion of the *expediente* by the intendant, that equity still remains; but if it required the approval of the superior board of the treasury to vest an equity in the petitioner, upon which the claimant could demand a transfer of the full title, then the failure of the intendant to transmit the *expediente* could not supply that defect. When the official title was issued by the commissary-general on May 15, 1825, it does not appear, either by the preamble or the grant (patent), that the petitioner for the original grant requested this official to violate the law and extend him a title, nor does he purport to have done so because of any request on behalf of anyone or by virtue of any law or regulation promulgated subsequent to independence, and the proposition (substantially as contended by appellants) that, because this officer has in a number of other instances, under similar circumstances, extended titles of this character, we are to assume

that he had lawful authority therefor, is expanding the doctrine of presumption as to the acts of officials farther than I understand the courts of the country have gone, and farther than I believe they are authorized to go under the limitations imposed upon them by the act of March 3, 1891, conferring jurisdiction upon the Court of Private Land Claims. It is evident that the intendant, by the time he had concluded the *expediente*, had some doubts as to his powers in the matter, otherwise he would have attempted to transmit the *expediente* to the superior board of the treasury. It is also apparent that the petitioner in the case thought little of his purchase, or he evidently could have induced the intendant to transmit, or permit to be transmitted, his *expediente* to the superior board of the treasury for its approval.

It appears that commissary-general Riesgo did not exercise the right to extend this title upon an *expediente*, made up under laws in existence prior to the creation of his office and conferring jurisdiction upon him as a revenue officer, because of the receipt of any revenues due the national government, for it is shown that the payments required under the ordinance of intendants had been made to the intendant, and no authority has been called to the attention of this court or the court below, wherein a commissary-general was authorized to extend a title based upon an ancient *expediente*, when the purchase money had been paid to the former government.

To the best of my ability I have endeavored to carefully refer the court to all the laws and regulations bearing upon the disposition of the public lands within the

period from December 4, 1786, to January 26, 1831, except those passed by the state of Sonora, and I feel that I have reasonably well shown, as a matter of fact, that neither the intendants nor the commissaries-general had authority to dispose of the public lands, or to extend titles under ancient laws.

It is contended by the government that this case comes within the rules and principles announced by this court in the case of *Ainsa* v. *United States* (161 U. S., 208), Los Nogales de Elias grant; that it is a grant by quantity and not by outboundaries, and that the same has not been located within the outboundaries, as claimed to have been surveyed by the original surveyor. Assuming that the ordinance of intendants was in force at the time the *expediente* was made up, the officials did not have authority to dispose of lands by metes and bounds, but only by quantity, and were required to fix the value for certain characters of land, and attributing to them an integrity which I do not believe they deserve, it must follow that the intent was to make a grant by quantity. The petition for the grant asks for two *sitios* (8,676.92 acres). The petition filed in the Court of Private Land Claims alleges that the area of the grant is 12,147.69 acres. The final claim made, based upon Roskruge's survey with the *expediente* before him, was for 22,925.87 acres. The exact amount of land appraised, advertised, sold, and auctioned off was one and three-quarters *sitios* (7,591.67 acres), and it is now insisted that it was a grant *ad corpus* consisting of 22,925.87 acres. The only manner in which Mr. Roskruge was able to locate this grant was by the natural

objects called for as outboundaries, including therein, according to his survey, 22,925.87 acres instead of 7,951.67 acres or the one and three-quarters *sitios*. It may be claimed that one and three-quarters *sitios* can be surveyed because the initial point can be found, and such could have been the case for the seven and a half *sitios* and a few short *caballerias*, in the Ainsa case referred to, for the initial point could be found, to-wit, the north Cruiz monument on the north line of the Casita grant, situated on the road to Tubac, but in neither instance will a survey by quantity include all of the land within the outboundaries as designated by natural objects. It is apparent that the quantity called for was located in neither case at any specific place within these outboundaries of the greater area, and therefore, under the sixth article of the treaty of December 20, 1853, such grants are not entitled to recognition.

The officers were not authorized to grant lands *ad corpus*, but only *ad mensuram*, and not then until the character, value, and the needs of the applicant, together with his ability to use it all for the purposes intended, had been made fully to appear. (Reynolds, 68. Decree of February 14, 1805.)

Viceroy Iturrigaray ordered that the owners should settle and cultivate their lands within one year. Decree of August 29, 1805 (Reynolds, 76), articles 7 and 8, Imperial Colonization Law of January 4, 1823. (Reynolds, 100.)

There are two general methods of disposing of lands, viz, *ad mensuram* and *ad corpus*.

Lands disposed of *ad corpus* include all lands within the metes and bounds described in the papers conveying them. On the contrary, lands disposed of *ad mensuram* do not include any but the precise quantity attempted to be conveyed, regardless of the metes and bounds or natural objects described in the titles. Any overplus land within the metes and bounds described is variously known in Mexican and Spanish law as *demasias*, *excedencias*, *excesos*, and *sobrantes*.

The Crown of Spain, and afterwards the Mexican government, always claimed and disposed of these overplus lands.

The first Spanish law we find on overplus lands is Law XIV, Title XII, Book IV, of the compilation of the Indies, of Philip II, of November 20, 1578; March 8, 1589, and November 1, 1591, as follows:

> Inasmuch as we have fully succeeded to the seigniory of the Indies, and inasmuch as the vacant lands, soils and grounds that have not been granted by the Kings, our predecessors, or by Us, or in Our name, belong to our royal patrimony and crown, it is necessary that all the land, that is held without just and true titles, be restored to us, according and as it belongs to Us, so that, reserving, before all things, what should appear to Us, or to the viceroys, audiences and governors, to be necessary for parks, town commons, municipal domains, pastures and vacant lands for the places and councils that are populated, as well with regard to what concerns the future and the increase they may have, and allotting to the Indians what they might well need for farming and for making their plantations and for stock-raising, confirming them in what they now

have and giving them again what is necessary, all other land may remain and be free and unburdened to grant and dispose thereof at our will. For all of which we order and command the viceroys and presidents of the pretorian audiences, to set, when it shall appear to them convenient, a proper term for the possessors to exhibit before them and the ministers of their audiences, whom they shall appoint, the titles of lands, stock farms, Indian farms, and *caballerias*, and, after protecting those who hold under good titles and instruments or just prescription, the rest be returned and restored to Us, to dispose thereof at Our will.

Mr. Orozco, after quoting this law, Vol. II, page 1007, says:

And Law XVII of the same book and title expressly declares that the public lands are a part of the royal exchequer. The same declaration is found in Chapter XIII of the royal instruction of October 15, 1754.

Relying on the texts transcribed, we can set down the principle:

*The public lands in the republic of Mexico are imprescriptible.*

Mr. Orozco, at page 45, Vol. II, of his work on Legislation and Jurisprudence on Public Lands, says, after quoting this same law:

This law contains the important, clear, and explicit declaration that the public lands are the property of the nation, which, in the epoch when this law was made, was represented by the Royal Crown or by the Imperial Scepter, in accordance with the political institutions of those times. Neither before nor after this law does there exist any declaration as

> solemn and express as the one it contains of the eminent dominion of the state or public power over the territory in which the state exercises its sovereignty. * * * This most important law has served as the basis and juridical supposition not only to all subsequent regulations, such as the royal instruction of October 15, 1754, and the law of July 22, 1863, but even to clause 24, article 72, of the political constitution of the republic. It also establishes the principle of the official investigation to discover and habilitate public lands and the revision of titles of lands issued by the sovereign, which serves as a legal precedent to article 1 of the law of May 31, 1875, and to article 18 of the law of December 15, 1883, and serves, up to date, as a juridical foundation to the investigations and proceedings followed in this respect by the companies which are delimiting public lands.

Philip IV, in Madrid, on May 17, 1631, issued the following *cédula*, Law XV, Title XII, Book IV:

> Considering the greatest benefit of our vassals, we order and command the viceroys and governor-presidents to make no innovation in the lands composed by their predecessors, but to leave the owners in peaceable possession thereof; and that those who have entered and usurped more than what belongs to them under their titles be admitted, in regard to the excess, to moderate composition, and that new titles be issued to them, and that they cause all those lands that are in condition for composition to be sold absolutely at public sale, after due publication, and be sold to the highest bidder, and be given to them at the rate of a redeemable quitrent, according to the laws and decrees of these kingdoms of Castile.

Philip IV, June 30, 1646, Law XIX, Title XII, Book IV, ordered—

> That he be not admitted to the composition of lands who has not possessed them ten years, although he alleges that he is in possession thereof, because this pretext alone is not sufficient; and that communities of Indians be admitted to composition, with preference over all other private persons, giving them every convenience.

The royal instruction of October 15, 1754, also provides for the acquisition of overplus lands in its article 7. (See this instruction, Reynolds, p. 54.)

There is no other federal law on overplus lands till July 22, 1863, articles 5, 6, 7, and 8 of which provide for the acquisition of such overplus lands.

Article 4 of this law cedes to the states one-third of the price received for public lands within their boundaries. It may be asked why this cession was made. Mr. Orozco, at page 349, Vol. I, of his work, answers it as follows:

> The law of 1863 might have had a reason, taking into account the circumstances, for holding toward the states the considerations revealed in its article fourth. Mr. Juarez, who promulgated that law, personified the federal republican party, and everything that approximated to centralism or imperial government had to be prejudicial to his banner. It was then necessary not to wound, either immediately or remotely, the susceptibilities of the states, and, perhaps, from that necessity arose article 4 of the law of 1863, for in those times the states still had susceptibilities, and susceptibilities that were sometimes dangerous.

Lands that formed part of the revenue systems of either Spain or Mexico were imprescriptible, and the continuous possession claimed for the grantee will not enable him to hold in excess of the cabida legal, as the lands were part of the revenues under the old system.

An exact statement of the condition of the archives at Hermosillo is to be found in the official report of Special Agents Tipton and Flipper, before referred to. Upon the *expediente* of this grant there is an unsigned indorsement which states that final title was issued on May 15, 1825. There is in the archives a certified copy of the *testimonio* of the title, made at Ures, July 30, 1855, and upon the same is the following indorsement (agents' official report, p. 21):

> Land Commission of the Agency of Public Works in the Department.
>
> This commission having compared the *testimonio* of title presented by Don Joaquin V. Elias, proprietor of the ranch known as San José de Sonoita, with the original, which he also presented, found it correct, and, therefore, it is returned to him, that he may appear, with this copy, before the agency reestablished in Hermosillo, having complied with article 2 of the law of July 7, 1854.
>
> Ures, July 31, 1855.
>
> (Signed) LUCAS DE LLAIN. [Rubric.]

This same indorsement appears in fifteen other grants wherein certified copies of the *testimonios* of title were made in 1855 (one being made in 1854), the numbers of which are given in the official report of the agents, page 2.

In 1895 I received information that after the promulgation of what is known as the decrees of Santa Anna, November 25, 1853, and July 7, 1854, an agent of the department of public works of Mexico was sent to Hermosillo for the purpose of investigating the archives and ascertaining their condition, and that a list of the *expedientes* had been made by him and a copy thereof left in the archives. In our former investigations we had never been able to discover any such document, nor was any information as to the likelihood of its existence disclosed to us. In 1896 I instructed Special Agent H. O. Flipper to go to Hermosillo and make a further investigation, and particularly I officially requested the keeper of the archives, Mr. Bartolomé Rochin, to aid him in ascertaining whether such a list existed. Mr. Rochin immediately found the list desired, but it failed to conform to exactly what I had been given to understand it was. It was a very large list, covering eight folio pages of tabulated matter, and the majority of the *expedientes* mentioned therein were of no value to us. I did not deem it advisable to expend the amount demanded for a certified copy. I instructed the special agents, however, to particularly examine this instrument, and the result of the same is embodied in their report, pages 1 to 3. It appears that there were in the archives at Hermosillo *expedientes* in the following Arizona grants: San José de Sonoita, San Ignacio de la Cano, San Rafael de la Zanja, San Bernardino, San Juan de las Boquillas y Nogales, San Rafael del Valle, Nuestra Senora del Carmen (a)

Beunavista, San Ignacio del Babocómari, and Agua Prieta; nine in all.

The *expedientes* in the following Arizona cases were not found in the list:

Aribac, Tres Alamos, El Sopori, Tumacacori, Calabazas y Heubabi, Reyes Pacheco, El Paso de los Algondones, and the Peralta grant.

This may throw some light upon the indorsement on the copy of the *testimonio* of this grant, before noticed. Evidently Santa Ana's decree of July 7, 1854 (Reynolds, 326), was in operation.

The effect of the decrees of Santa Ana of November 25, 1853 (Reynolds, 324), which was made pending the negotiations for the treaty, and that of July 7, 1854 (Reynolds, 326), has been fully discussed and briefed in the case of *United States* v. *Coe*, Algodones grant, No. 8 on the present docket, and I do not deem it advisable to again enter into the same, inasmuch as these two cases will probably be argued within a short time of each other.

In all the investigations that have been made we have yet to discover a single grant where the initiatory proceedings were commenced before the commissary-general, whose office was created by the law of September 21, 1824, and evidently in existence until April 17, 1837, although his powers and duties were changed from time to time.

In connection with this case I respectfully refer the court to the dissenting opinion of Mr. Justice Murray in

the case of the *United States* v. *Maish et al.*, for the confirmation of the San Ygnacio de la Canoa grant, No. 297. (R., 102.)

Respectfully submitted.

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